IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Cite as: Neville v. MacAllister, 2005 NSSM 21

Claim No.: SCCH 235113
Date:20050530

BETWEEN:

Name: **Robert Neville and Lynn Dupuis** Claimants

- and -

Name: **Terry MacAllister** Defendant

Revised Decision: The text of the original decision has been revised to remove personal identifying information of the parties on December 13, 2006. This decision replaces the previously distributed decision

Appearances:
Claimant: Kendrick H. Douglas
Defendant: Nicolle A. Snow

Hearing Date: March 31, 2005

D E C I S I O N

[1] There are three issues in this case:

1) Whether the oral agreement was as alleged by the Claimant or, alternatively, as alleged by the Defendant;

2) Does the *Statute of Frauds* have application;

3) Does the public policy rule against illegal contracts prevent the Claimant from maintaining this action.

(1) Terms of the Oral Agreement

[2] The Claimant says that the written Agreement of Purchase and Sale in respect to premises at 10 Hazelwood Drive, Lantz, Nova Scotia dated August 25, 2004 had an overstated purchase price. In the written Agreement it is stated to be $175,000.00 while the "actual

price" as per the oral Agreement was $154,000.00. While $17,000.00 was paid on October 15, by the Defendant to the Claimants, a balance of $5,150.00 remains outstanding.

[3] For his part, the Defendant acknowledges that the purchase price was inflated, but he says it was inflated by $17,000.00 and that he indeed paid that on October 15, and nothing is left outstanding.

[4] This issue is essentially a pure issue of fact on the evidence. Which party is to be believed.

[5] In support of her version, the Claimant submitted Exhibit C-3 and Exhibit C-4. Exhibit C-3 reads as follows:

> "*BALANCE OWEING*
> *SEPTEMBER 14, 2004*
> *I Terry MacAllister will redeem Lynn Dupuis with the balance of the mortgage cheque after the 144, 100.00 that is owed to me for the home on 10 Hazelwood Avenue, This will be payed to Lynn Dupuis within 24 hours of me receiving the balance due that is owed to me for the home on 10 Hazelwood Ave.*
>
> *X: Terry MacAllister*
> *X: Lynn Dupuis*"

[6] Exhibit C-4 is a hand written note which is as follows:

> *"October 15/04*
>
> *I Terry MacAllister paid Lynn Dupuis $17,000.00 I still owe $5150.00 by 29 (TM) of Oct.*
>
> *Terry MacAllister*
> *Lynn Dupuis"*

[7] If these documents are accepted as authentic, then the Claimants' version must be accepted. However, the Defendant denies that the signature on Exhibit C-3 or C-4 is his. He essentially asserts that these documents are fabrications.

[8] I accept the Claimants' version over the Defendants' version. My reasons for coming to this conclusion follow.

[9] First, what I consider to be the most compelling piece of evidence is the Option to Purchase Agreement dated October 10, 2003 which is for a Purchase Price of $154,000.00 (paragraph 1) which is to be adjusted by the amount of rent paid by Dupuis and Neville to MacAllister up and to the time of the closing date. This adjustment would have been for 11 months at $900.00 per month which is $9,900.00. That, it will be seen, is the exact difference between $154,000.00 in the Option to Purchase and the $144,100.00 in the document dated September 14, 2004 (Exhibit C-3). The Agreement of Purchase and Sale was dated August 25, 2004 and provided for a closing date of September 30, 2004. Therefore, the parties would have known the number of month's rent which would have been paid by September 30.

[10] It is recognized that conceivably if Exhibit C-3 was a complete fabrication, the Claimant could have created this figure or would have inserted a figure consistent with the figures already referenced previously. However, what is an unassailable factor is that if the version proposed by the Defendant was accurate, why would the Claimant have not insisted on the terms of the Option to Purchase Agreement? That is, the $154,000.00 figure net of the actual rent paid up to the closing date. No answer has been given to this. I consider this to be a compelling factor in support of the Claimants' version.

[11] A further factor is that to accept the Defendants' story, I have to conclude that the Claimant fabricated both Exhibit C-3 and Exhibit C-4. While the Court does not possess the expertise of a handwriting analyst, I certainly think it not inappropriate to comment that the signature of Terry MacAllister does appear similar to his signature on the Deed. I think it a highly unlikely proposition that the Claimant here would have fabricated these documents.

[12] Then, I weigh the likelihood of that proposition against the proposition of the Defendant disavowing his signatures. I consider that in relative terms, the latter is more likely

[13] I consider all of these things in the context of the burden of proof in a civil proceeding. It is proof on a balance of probabilities ie., is it more likely than not. Thus, a Claimant does not have to demonstrate matters to a level of certainty or near certainty or equally, does not have to provide proof in the criminal standard, which is proof beyond a reasonable doubt.

[14] Applying the civil standard to the evidence presented , I accept the Claimants evidence.

(2) Statute of Frauds

[15] While this matter was not canvassed by counsel, it seems to me that as this is an Agreement for the sale of land, the requirements of this Statute must be met. I would consider that the writing or Memorandum of September 14th entered as Exhibit C-3 satisfies the requirements of Section 7(d) of the *Statute of Frauds*.

(3) Public Policy

[16] The issue here arises because there are in effect, two Agreements. One for purposes of bank financing and on being the "real" Agreement. From the evidence, neither of the parties' counsel on the closing were aware of the second, "oral", Agreement. And, while there was a dispute at the hearing as to the exact terms of this second Agreement, there was no dispute that both parties were aware of it.

[17] The purpose of having two Agreements was clear. It was to arrange for higher financing amount. The facts therefore bring it very much within the case of the Supreme Court of Canada of ***Letkeman v. Zimmerman,*** **[1978] 1S.C.R. 1097**. Indeed, the facts are identical expect that in the ***Letkeman*** case the vendor refused to complete and the purchaser sued for specific performance. The court would not assist the purchaser in enforcing the contract, being a contract for an illegal or unlawful purpose. This is a strong authority and obviously binding on this court.

[18] Mr. Douglas for the Claimant submitted a case also from the Supreme Court of Canada called ***Fonciere Cie d'Assurance de France v. Perras* [1943], S.C.R. 165** in which Davis J. states as follows:

> *"No doubt there is a rule that, if a contract be made contrary to public policy, or if the performance of a contract would be contrary to public policy, performance cannot be enforced either at law or in equity; but when people vouch that rule to excuse themselves from the performance of a contract, in respect of which they have received the full consideration, and when all that remains to be done under the contract is for them to pay money, the application of the rule ought to be narrowly watched, and ought not to be carried a step further than the protection of the public requires."*

[19] That principle on its face does appear to have application here. However, it was adopted by the Supreme Court of Canada in a case dealing with an insurance claim where an insurance company denied liability because the Claimant has been convicted of a criminal offence. The majority decided the case on the basis of reception of the certificate of conviction. Davis J. refers to the rule of public policy as it applies to a person convicted of an offence and making a claim. He felt that while there was no question the chauffeur was negligent, it was not the sort of negligence that would be considered criminal negligence.

[20] In the circumstances, I would think this case is not a direct authority to the situation we have at hand. My view is the case presented by Ms. Snow for the Defendant is much closer to the situation here. That is, the case of ***Letkman v. Zimmerman,*** previously cited. Ms. Snow has also provided me with authority which supports the proposition that where both parties have "dirty hands" it does not allow the Court to ignore the general rule of not enforcing contracts which have as their purpose an illegal or unlawful purpose. Therefore for these reasons, I find the rule does apply and the claim must be dismissed.

Disposition

[21] For the above reasons the claim is dismissed without costs.

DATED at Halifax, Halifax Regional Municipality, Nova Scotia on May , 2005.

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Michael J. O'Hara

Adjudicator

Original	Court File
Copy	Claimant(s)
Copy	Defendant(s)